

IN THE MATTER OF ARBITRATION )  
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SOUTHWEST AIRLINES CO. )  
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)  
and )  
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)  
TRANSPORT WORKERS UNION OF )  
AMERICA, AFL-CIO, LOCAL 555 )

Case No. MCO-O-2360/12

Christina Bennett, Esq., for the Employer  
Brian Smith for the Union  
Before Matthew M. Franckiewicz, Arbitrator

**OPINION AND AWARD**

This arbitration proceeding involves the discharge of Grievant [REDACTED]

A hearing was held on April 10, 2012, at Dallas Texas. Both parties called, examined and cross examined witnesses, and offered documentary evidence. Both parties filed briefs. The record closed with the exchange of briefs on May 21, 2013.

**Contract Provisions Involved**

ARTICLE TWO  
SCOPE OF AGREEMENT

D. Management Rights. The right to manage and direct the work force, subject to the provisions of this Agreement, is vested in and retained by the Company.

ARTICLE FIVE  
CLASSIFICATIONS

SECTION TWO  
OPERATIONS AGENT/FREIGHT AGENT

U. Provides friendly service to all co-workers and Customers.

ARTICLE TWENTY  
GRIEVANCE / SYSTEM BOARD / ARBITRATION  
DISCHARGE and DISCIPLINE

SECTION ONE  
PROCEDURES

A. Purpose. No Employee who has passed his probationary period shall be disciplined to the extent of loss of pay or discharge without just cause.

B. Representation Requirements. The Union and the Company shall be represented at each location. These representatives shall be empowered to settle all local grievances without setting precedent of any kind. The Local Representatives for the Union shall be selected from members of the Union who qualify under Article Two. The Local Representative for the Company shall be the Manager or his designee. Neither party shall be represented by legal counsel through and including the System Board. Legal representation shall be permitted in the case of Arbitration.

C. Cost of Arbitration. It is understood and agreed that the cost of arbitration shall be borne by the losing party.

G. Fact-Finding Procedures. No covered Employee shall be subject to discipline involving loss of pay or discharge without first having the benefit of a factfinding, with the right to have a Union representative present, in accordance with the following procedures.

\* \* \*

2. Suspension. Notwithstanding the foregoing, the Company may suspend a covered Employee pending a factfinding and/or until such time as the decision of the Company resulting from the factfinding is rendered, subject to the following conditions:

- a. The suspension shall be a paid suspension;
- b. The basis for the suspension shall be reduced to writing and presented to the Employee and the local representative of the Union within two (2) working days of the suspension;
- c. The factfinding shall be held within three (3) working days of the presentation of the written notice of the basis for suspension; and
- d. The Company shall render its decision (inclusive of any discipline), in writing to the Employee, within five (5) working days after completion of the factfinding, and a copy of the decision shall be delivered to the local representative of the Union.

L. Interpretation/Application of Agreement. In the event of a grievance arising over the interpretation of, or application of, this Agreement, or in the event of a disciplinary action

other than discharge, the following steps shall apply. However, if the action involves discharge or a Union grievance concerning a change in Work Rules, it shall proceed to sub-paragraph 3, below. Decisions made pursuant to Steps 1 through 3, below, shall not constitute precedent of any kind unless agreed to, in writing, by the Union and the Company.

14. Arbitration/Function and Jurisdiction. The functions and jurisdiction of the Arbitrator shall be as fixed and limited by this Agreement. He shall have no power to change, add to, or delete its terms. He shall have jurisdiction only to determine issues involving the interpretation or application of this Agreement, and any matter coming before the Arbitrator which is not within his jurisdiction shall be returned to the parties without decision or recommendation. In the event any disciplinary action taken by the Company is made the subject of proceedings, the Arbitrator's authority shall, in addition to the limitations set forth herein, be limited to the determination of the question of whether the Employee(s) involved were disciplined for just cause. If the Arbitrator finds that the penalty assessed by the Company was arbitrary or unreasonable, he may modify or remove that penalty.

## The Facts

Grievant [REDACTED] was an Operations Agent at Orlando Florida, with about five years service.

[REDACTED] was terminated on December 12, 2012 over an incident that occurred on December 6, 2012. The termination letter states:

A fact-finding meeting was held on Monday December 10<sup>th</sup> 2012 to discuss your performance, attitude, possible insubordination and a weight & balance error on flight 1103, December 6<sup>th</sup> 2012. Present at this meeting were you, TWU Representative [REDACTED], TWU Representative [REDACTED], Manager Station Administration Tammy Mele, and myself.

After a thorough and complete investigation into this matter, and after review of the testimony and documents provided at the fact-finding, we have concluded that you had a failed comply with the directions given to you by your supervisor to return to your assigned duty. Such conduct is not consistent with Southwest Airlines. This behavior is unacceptable, and is in violation of the Southwest Airlines Ground Operations Basic Principles of Conduct, including, but not limited to, the following:

2. An Employee on duty and in uniform reflects the SWA attitude to our Customers on a personal basis. It is imperative that you remember that your appearance, attitude, and conduct, whether on or off duty, may be a reflection on SWA, and that you act accordingly.
4. Complete coordination with Coworkers and Supervisors is required to provide harmonious working conditions.
14. Performing your job in a careless, negligent, or unsatisfactory manner.

15. Insubordinate conduct or refusing to follow a work order or any act of insubordination.

██████ this is not the first time you have been addressed concerning your job performance. You have the following letters in your file. Letter of Final Warning for performance on May 30<sup>th</sup> 2012 and a Letter of Final Warning (+ 3 day suspension) for performance on June 19<sup>th</sup> 2012. You also have a discussion log from June 20<sup>th</sup> 2012 for wearing an electronic device (headphones) at work.

Based on the above and because of your actions, your employment with Southwest Airlines is terminated effective immediately.

The May 30, 2012 Letter of Final Warning mentioned in the termination letter states that ██████ “failed to change out your printer cartridge which resulted in the loading schedule not being legible, causing a 1 minute originating delay on Flight 1787 05/19/2012,” in violation of items 4 and 14 of the Basic Principles of Conduct.

The June 19, 2012 Letter of Final Warning and 3 day suspension mentioned in the termination letter states that ██████ “failed to scan the Boarding Pass of Customer ██████,” in violation of items 4 and 14 of the Basic Principles of Conduct.

Grievant ██████’ immediate supervisor, Operations Supervisor Ricardo Freitas, testified that on the afternoon of December 6, 2012 he was performing weight and balance audits, a typical duty. The Cargo Bin Loading Schedule (CBLs) is used to track how baggage is stored, to help insure that the weight of the plane is properly balanced. A Ramp Agent completes the top portion of the CBLs and an Operations Agent fills out the lower part. On the CBLs for the flight, which had pushed from gate 126, Ramp Agent ██████ had entered in the column for bin F, STL with the number 3 next to it. The “3” had a faint line through it, and the number 5 was written above it on the sheet. On the bottom part of the CBLs, ██████ had entered 3 bags for bin F.

Freitas knew that ██████ did not have a flight to handle and called him to Freitas’ office to ask about the apparent discrepancy. ██████ said that there were 5 bags. According to Freitas, ██████ then drew a line through the entire line that showed STL 3 (with a faint line already crossing through the 3 only).

According to ██████ he did say that the correct number was 5 bags, but ██████ did not line through the entry on his own: Freitas told him to cross it out. Freitas, however, denied telling ██████ to line through the entry and stated that ██████ did so on his own.

Freitas testified that after he talked to ██████, he radioed Grievant ██████ and asked where he was. ██████ said he was at 126, heading to 125. Freitas walked to Gate 125. The door to the jetway was open, and ██████ was at the podium. According to Freitas he walked over to ██████ and stood next to him, side by side about two feet away. He asked if ██████ had a few minutes, and ██████ said sure. Freitas asked if he could clarify what the CBLs said in F. ██████ replied three. Freitas said he would have seen an 8. Freitas asked ██████ to write a statement. ██████ said no, Freitas had altered the document, leave the paperwork here. Freitas said no, he had not altered it, the Ramp Agent had, and he would make a copy. According to Freitas, his voice was calm, though he was speaking louder than normal because of the noise. At the

time, passengers were in the gate area but had not yet begun to form a line. The flight was due to depart about 45 minutes later.

According to Freitas, he began to walk away but ██████ became argumentative and followed him, with the jetway door still open. Freitas told ██████ to stay at his gate, his plane was in range. ██████ closed the jetway door and followed Freitas. Freitas made the copy and handed it to ██████, who had come to the door in Operations. Freitas told ██████ "I need you to go back upstairs to work your flight." ██████ went to the Coordinator's box outside Freitas' office. Freitas said ██████ "I need you to go back to your gate, work your flight. Your plane is in range. I need you to go back to your gate." ██████ replied "Find someone else. I'm not doing it."

Someone called from gate 125 to say that there was no one to park the aircraft. Freitas noticed that ██████ was in the Coordinator's area and asked him to meet the aircraft. ██████ did not return to gate 125. The OTIS record shows that ██████ was scheduled inbound flight 1181, and ██████ assisted by ██████, was scheduled the outbound 1181 flight. Only the primary can enter the system for the pertinent record keeping. Agents cannot change the designation of the primary; a Supervisor must do this. The OTIS was amended to list ██████ as primary at gate 125 for flight 1181.

Freitas stated that about ten minutes after he last saw ██████, ██████ returned with Union Representative Evelyn Diaz. Freitas called ██████ into the office and ██████ verified that he had made the change on the CBLS. They discussed the numbers that were written on it. Freitas said there would probably be a fact finding.

Freitas related what had happened to Manager Ramp and Operations John Brophy.

He prepared a written statement about the incident. It states in part:

I walked into the Operations area and made a copy and handed to him since he was trying to grab the paperwork out of my hands in the gate area.

I then directed him to return to his gate. He then said "Find someone else". I repeated myself again 2 more times inside the Box area of Operations. ██████ I am telling you to report back to your gate. Your flight is going to land! "Don you understand what I just said"? (Michael McCauley was present). (Possible insubordination??)

████████ then said to me. "I'm going to find a Union Rep". He then stormed out of Ops.

Orlando Operations Supervisor Mike McCauley testified that around 2:00 p.m. on December 6, 2012 he was sitting in the Assistant Coordinator's position. ██████ walked in and Freitas walked in behind and told ██████ he needed to go up to work his flight, but ██████ said "No, I'm not going to" and walked out. ██████ did not say he had arranged for someone else to cover the flight. Freitas asked ██████, who had started at 2:00, to park the inbound plane. He noted that the pilot and someone from ramp 125 had called to say they needed a jetway driver. McCauley called ██████ on the radio but got no answer. McCauley called gate 125 and asked if ██████ was there. ██████ said he was not and McCauley asked ██████ if he would work the entire flight, and switched him from assist to primary on the outbound flight so that ██████ could do the paperwork. No one assisted on the outbound flight.

According to McCauley, Ramp Agents are not allowed to determine their flight assignments, and he is not aware of an instance where one Operations Agent swapped with another at a gate without communicating that to supervision.

Freitas said that it was not unusual for him to talk to an Operations Agent at the gate, and he has done so previously, and that conversations about flights happen regularly in the gate area. McCauley testified that he has asked Operations Agents at the gate about CBLS discrepancies, and in at least one case discipline has resulted. John Brophy testified that it is common for a manager to have a conversation with an Operations Agent while the agent is working a flight.

Discrepancies on paperwork could lead to employee discipline. ██████ had been counseled for weight and balance issues on April 25, 2011 and April 27, 2012, on June 5, 2011 for passenger count discrepancy and on December 12, 2011 for originator delay.

Grievan ██████ testified that on December 6, he was headed from gate 126 to gate 125 for his next flight when Freitas radioed and asked where he was. He said he was headed to 125. ██████ had opened the door and announced that the aircraft was on its way. Some passengers started to line up but he advised them they did not have to yet. Some stayed in line. A few passengers had questions. Perhaps 60 passengers were standing at the podium.

Freitas walked up holding a piece of paper and said he had some paperwork that is incorrect, holding it at arm's reach. ██████ did not understand, and Freitas said his paperwork was incorrect on an earlier audited flight. ██████ said he did not know what Freitas was referring to and asked him to bring it close so he could see. Freitas said he could see. ██████ noticed that there appeared to be changes on the sheet. Freitas said you need to fix your paperwork, you have some paperwork with an error. ██████ asked "Can you please show me the paperwork?" At that point ██████ said he needed to speak to a Union representative. (He said he was concerned because he knew he had discipline on his record, and he was trying to get his paperwork.) Freitas said no, and walked off. Passengers were in earshot of the conversation. ██████ felt embarrassed and thrown off.

█████ closed the door and called another Operations Agent and asked him to park ██████' flight. Freitas told ██████ to stop following him. ██████ headed to the Operations Coordinator's box, hoping to find a Union representative. As he walked in the door, Freitas said, "What are you doing? Give me your ID. I'm going to suspend you. Go back to your flight." ██████ said someone was at his flight, it was covered. Freitas continued to say give me your ID, I'm going to suspend you. ██████ said nothing further to Freitas. ██████ asked Mike McCauley who the Union representative for the day was. He replied ██████, who was at gate 124. As ██████ walked away, Freitas asked "Where are you going?" Nothing further was said at that time. ██████ acknowledged that Freitas told him to work the flight. He did not work the inbound flight, but he stated that he did go back to gate 125 after leaving Freitas' office. He said he did not work the outbound flight because McCauley took him to the office to be suspended. OTIS showed ██████ as the primary on the outbound but ██████ said that he went back to assist.

█████ found ██████ and the two went to Freitas' office. Another Operations Agent was there saying I made an error, I should have crossed it all the way through. Freitas pulled out the bin slip and asked what ██████ saw. ██████ said there was a 3 crossed out. Freitas said it would have been an 8. Freitas did not tell him he needed him at gate 125. Freitas did not say he was being insubordinate or that if he did not complete the task he would be fired.

█████ testified about his earlier relationship with Freitas. One day he was working a shift until 2:30, and at around 1:45 he asked Freitas if he could LWOP (leave early). Freitas said he would let █████ know. At about 2:25 Freitas came by and said he could LWOP now. On another occasion █████ signed up for overtime. Freitas came by later, held out his hand, and said congratulations. █████ asked for what and Freitas said you didn't get it.

█████ testified that on December 6, he had finished a flight at gate 121, when █████ called and asked if he would meet █████ flight that was to arrive at 125. █████ agreed. When he arrived at gate 125, the plane was on the ground but not yet at the gate. █████ opened the door, and said he would handle the flight. █████ called █████ and said █████ got you." █████ did not tell any Management about the switch, and had not planned to work the outbound flight.

█████ said that he has never been consulted at a gate by Management about a paperwork discrepancy, but is most often called to the office. He stated that Operations Agents cover one another's flights, without first consulting supervision. █████ characterized Freitas as "a very strict supervisor, by-the-book kind of person."

Ramp Agent █████ testified that he was walking from the elevator to gate 125, which is about 40 feet away. He saw Freitas hold up a piece of paper to █████, the way a limo driver holds a passenger name sheet. █████ saw both █████ and █████ in the gate area. The plane had not yet arrived. He stated that he has not been questioned on the flight line about a bin slip, only in the office. He has swapped duties with another agent without telling a supervisor.

█████ testified that she was at gate 124 when █████ came to get her. He said there was an issue with his bin slip, someone did something to it and Freitas was making a big deal, and they needed to talk to him. █████ was assisting on a flight and left with █████ for the Operations Supervisors' Office. She asked if his flight was okay and █████ said █████ was covering it. █████ said it was his fault but he had fixed it. Freitas and █████ discussed whether the number should be a 3 or an 8. Freitas did not say anything about █████ not complying with an order. She remembered that █████ told her Freitas has asked for his badge after the suspension.

█████ has been asked about paperwork errors, usually in the office, never at a gate. Supervisors have come to talk to her at a gate, but not to discipline. She stated that as a primary, she can have someone else cover the flight, as long as she is there at the beginning or the end to handle the paperwork.

According to Manager Ramp and Operations Brian Pierron, at the fact finding █████ said there was no need for him to return to his gate because he already had █████ covering for him. █████ said he did not recall whether he told that to his managers on December 6. █████ "didn't flat out say that he did or did not refuse, he just said there was no reason for him to go back." According to █████ he did say at the fact finding that he told Freitas that the flight was covered and someone was at the gate to work the flight. █████ stated that at the fact finding █████ said that he had █████ cover his flight.

█████ evaluation, covering the period June 23, 2011 through April 23, 2012, prepared by Freitas, references four counselings, three of which were outside the evaluation period.

According to Trudy Christensen, Manager of Labor Relations for Ground Operations, termination would be consistent for an employee already on two final letters of warning, one with a three day suspension.

As to his final warning regarding the printer, [REDACTED] explained that the printer ran out of ink. He called his supervisor, who told him to print out the schedule at another gate. He did so, but by the time he got back the flight had a one minute delay. He grieved but the grievance was not pursued.

He also grieved his other final warning, but apparently this grievance was not pursued either.

### **Issue**

The issue, as agreed to by the parties, is: Was Grievant [REDACTED] terminated for just cause, and if not what should be the remedy.

### **Position of Management**

The Company cites the so-called seven tests of just cause devised by Arbitrator Carroll Daugherty. It sees only two of the seven at issue in this case, and it asserts that there was substantial evidence of guilt, and the discipline was applied fairly, without discrimination.

It submits that the Grievant's account is not credible. It deems that the Grievant went out of his way to disregard and disrespect his leader. It considers the Grievant's denial that he disregarded a work order as inconsistent with his claim that he was directed to surrender his badge, but did not do so.

The Employer maintains that Freitas and McCauley testified consistently, and that neither had any motive to fabricate. It contrasts that no witness supported the Grievant's version, and that he has a stake in the outcome.

The Company contends that the Grievant was treated even-handedly. It insists that Supervisors speak to Agents at all times during shifts and that the collective bargaining agreement acknowledges the Company's right to manage and direct the workforce. It urges that there is no evidence any other employee was permitted to engage in such conduct without disciplinary consequences, and that in view of his past record, the only appropriate discipline for the Grievant was termination. It summarizes that two final letters of warning had not had a corrective effect.

It avers that the Grievant had received training and was well aware of his responsibilities.

It asks that the grievance be denied.

### **Position of the Union**

The Union maintains that even though Supervisor Freitas knew the paperwork mistake was not the Grievant's fault, he went to Grievant [REDACTED] and accused him in front of customers of incorrect paperwork.

It contends that the Grievant told Freitas that his flight was covered, and that Freitas acknowledged as much. It stresses that Freitas did not “do the dance” of telling ██████ if he did not return to the gate he could be terminated.

The Union emphasizes that ██████ acknowledged responsibility for the paperwork mistake. It notes the conflict between the testimony of ██████ and that of Freitas as to how the bin slip was altered. It faults Freitas for lack of respect in speaking to ██████ in front of customers, rather than in the office as he did with ██████, or in the jetway.

It denies that the Grievant was insubordinate noting that Freitas never advised the Grievant that he was subject to discipline including termination. It recalls that ██████ did return to the gate after speaking with Freitas, and that in the subsequent conversation with the Steward present, Freitas raised no claim of insubordination.

The Union asserts that Freitas had a history of abusing the Grievant. It cites references in evaluations to stale discipline, and discipline for a printer running out of ink. It depicts Freitas as having a history of antagonizing ██████ referencing the “congratulations” and the late permission to leave early.

It summarizes that the discharge was arbitrary and capricious. It avers that the Grievant did return to work his flight but was locked out because Management had changed the primary on the flight.

It asks that the grievance be sustained and that the Grievant be reinstated and made whole.

## **Analysis and Conclusions**

A critical determination in this case is just what happened on December 6, 2012. In this regard I find the testimony of Freitas and McCauley to be generally more reliable, plausible and credible than that of Grievant ██████

As to their conversation at gate 125, it seems to me highly unlikely that ██████ spoke as politely as he related at the hearing.

One point on which Freitas and ██████ agree is that Freitas told ██████ not to follow him to the Operations Office. They differ somewhat as to just where this was said. According to Freitas, he told ██████ at gate 125 to stay at his gate. According to ██████ somewhere between gate 125 and the Operations Office, Freitas said to stop following him. Under either version though, it is clear that Freitas made ██████ aware that he did not want ██████ to come to the Operations Office. Although he had no need to go to the Operations Office, Freitas went there anyhow, in disobedience of Freitas’ instruction.

I credit Freitas’ account of what occurred at Operations, specifically that he told ██████ to go back to work his gate, but ██████ told him to find someone else, and that he was not going to do it. Freitas’ testimony to this effect was essentially corroborated by McCauley, and while both Freitas and ██████ may be biased or interested witnesses, McCauley was not. He had no personal stake in the outcome, and no personal involvement in the conversation. To me, his account seems highly credible and reliable.

Whatever arrangements ██████ made for coverage at gate 125, and whenever he made them, both Freitas and McCauley stated that someone called to say that the gate needed coverage, and I accept the accuracy of their account.

More critical, however, is what was not said. I specifically find that ██████ did not tell Freitas or McCauley that he had arranged for someone to cover at gate 125. Both Freitas and McCauley related that they arranged for ██████ to handle the flight at gate 125. If ██████ told Freitas and McCauley that he had arranged coverage, they would not need to duplicate the effort. They would, however, need to find out who was covering the flight, so that they could change the primary in OTIS and permit that employee to do the record keeping entries into the system. But under all accounts, ██████ never said, and the Supervisors never asked, who was supposed to be filling in for ██████. The absence of any discussion of who was supposedly covering for ██████ convinces me that ██████ never told Freitas and McCauley that he had someone covering at gate 125.

I also note that even under his own account, ██████ only arranged coverage on the inbound flight, and not the outbound flight. But in fact he did not work either the inbound or the outbound.

██████ conduct at operations amounts to a refusal to follow Freitas order that he return to work. Freitas did not use the word “order” but his meaning was clear and so was ██████ refusal. Refusal to follow an order is not necessarily the same as insubordination. This distinction is suggested in Basic Principle of Conduct 15, which separately prohibits both.

It may be that this does not amount to a classic case of insubordination. In an arbitration decision between these parties (Case No. MDW-R-1325/12) Arbitrator Gil Vernon stated:

Generally speaking, insubordination is the repeated resistance and/or refusal by an employee to comply with a “work order” issued pursuant to management’s authority to operate its enterprise. Discipline will be upheld when the following conditions are shown to exist:

1. The person giving the order had authority to do so;
2. The order was work-related;
3. The order was clear and was understood by the employee;
4. The consequences of disobedience were known to the employee;
5. The employee had sufficient time to comply.

Insubordination may be a more extreme offense than refusal to follow an order, since insubordination betokens an element of defiance. It may be that insubordination warrants discharge even for a first offense, but that disregard of an order, while still constituting serious misconduct, may not justify the discharge of an employee with an otherwise clean record. The distinction is unavailing in this case, however. Grievant ██████ had been issued within a little over six months before December 6, 2012, both a final letter of warning and a final letter of warning with a three day suspension. He was at the discharge rung of the progressive discipline ladder. In view of his recent record, the Grievant surely knew that another instance of significant misconduct would result in his termination.

I am not free in this case to second guess whether the final warning letter, and final warning letter and three day suspension were justified. Although the discipline may have been grieved, the grievances apparently were not pursued, and I must treat them as having been properly issued.

Even if Freitas had been rude to [REDACTED] on previous occasions, I do not find any element of provocation in his conduct on December 6, 2012, that would explain or excuse [REDACTED] refusal to go back to his gate. While it may seem more diplomatic to call [REDACTED] to the office rather than visiting him at the gate, doing so also might appear to be an escalation, turning a fairly routine inquiry into something that appeared more serious. In any case, I find nothing improper in Freitas visiting [REDACTED] at the gate to ask a question or two that should have taken no more than a minute.

Based on the above, I conclude that the Company had just cause for the termination of the Grievant, and therefore that the grievance must be denied.

### **Award**

The grievance is denied. Pursuant to Article Twenty Section One (C) of the collective bargaining agreement, the arbitrator's fee and expenses are allocated to the Union.

Issued June 10, 2013

Matthew M. Frankewing